1978

Betty L. Kessimakis v. Dale M. Kessimakis : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF

BETTY L. KESSIMAKIS,

Plaintiff-Respondent,

vs.

DALE M. KESSIMAKIS,

Defendant-Appellant.

Case No.

Appeal From a Judgment of
of Salt Lake

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Respondent,	)	Case No. 15387
vs.	)	
DALE M. KESSIMAKIS,	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This was a proceeding by a divorced husband, defendant-appellant, to modify the provisions of a divorce decree entered on August 28, 1974; and a proceeding by the divorced wife to obtain judgment for unpaid alimony and support money.

DISPOSITION IN LOWER COURT

The court refused to modify the decree, found the husband in contempt, and entered judgment against him for $16,391.40 for past due alimony, support money, mortgage payments, unpaid debts, and attorney's fees.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the district court entered on May 12, 1977, and remand to that court with directions to modify the decree by fixing a

reasonable time within which plaintiff may be permitted to pay off the judgment for arrearages, and suspending the payment of alimony and support money during the payout period.

STATEMENT OF FACTS

On April 22, 1974, respondent, Betty L. Kessimakis, commenced this action against Dale M. Kessimakis, by filing a complaint in the District Court of Salt Lake County, and having Dale sign an entry of appearance and waiver, prepared by Betty's attorney, in which he waived the time to answer or otherwise plead and consented to the entry of his default and judgment in accordance with the demand of the complaint (R 7). On May 9, 1974, an amended complaint was filed (R 12), and Dale signed a like entry of appearance and waiver with respect to the amended complaint (R 13).

The case was heard as a default matter on August 2, 1974, at which time Betty testified as to the grounds for divorce, the property of the parties and Dale's income. She testified that the parties owned a home in which they had an equity of $30,000, the home being worth approximately $50,000, with a mortgage balance of $20,000; that Dale had an earning capacity of from $600 to $3,000 per month; that for the past few months he had been earning $400 to $800 per week; that the home cost $47,000 to $50,000; that Betty

had put up $15,000 of the purchase price; that Dale's father had put up from $6,000 to $10,000, and that friends did much of the work on the house. She also testified that Dale had a share, "not much," in a family corporation with his father and brother (transcript of August 2, 1974).

On August 28, 1974, the court entered its decree of divorce (R 19-21). The decree granted a divorce to Betty, awarded her the custody of the three minor children, subject to reasonable visitation, $100 per month for each of the minor children's support and maintenance, and $200 per month as alimony. The decree also required Dale to pay all debts and obligations incurred by the parties during the course of the marriage, and a $500 attorney's fee.

In dividing the property of the parties, the court awarded Betty the entire equity in the residence (but ordered Dale to pay the mortgage on it), all of the furniture, contents and appliances in the residence, one-half of Dale's interest in Kessimakis Produce, Inc., the parties' only automobile, and her personal effects, clothing, and items of personal property then in her possession. The defendant was awarded his personal clothing and effects, one-half of his interest in Kessimakis Produce, Inc., and the personalty in his possession.

In February 1975, Dale filed a motion to set aside the default divorce on various grounds (R 24-25) which was denied

by Honorable Bryant H. Croft on March 21, 1975 (R 103). Formal orders denying the motion were entered on March 26, 1975, and April 3, 1975 (R 104, 105).

Dale Kessimakis then appealed to this court from the order denying the motion to set aside the default and the judgment (R 108). This court affirmed the trial court on the ground that the motion to set aside the default judgment was not timely and an abuse of discretion had not been shown. In its opinion the court noted:

> The principal complaint made by the defendant is that the court imposed upon him a financial burden with which he is unable to comply, and that the plaintiff did not testify truthfully to his wealth and earnings. If such be a fact, he is not helpless. He may petition the trial court for a modification of the terms of the decree, if there is a change in circumstances. While his actual earnings now may be the same as they were the time of the divorce proceeding, neither party can at this late date dispute the findings made by the court at the hearing. If plaintiff's earnings and wealth are now less than what the court found them to be, there is a change of circumstances which would justify a consideration by the court for need to modify the original decree. (R 140).

When the case was remitted to the district court, the husband filed a motion to modify the divorce decree and a petition for an order to show cause to modify the divorce decree (R 144, 181-182), and on August 9, 1976, the court entered an order to show cause based upon the husband's motion and petition (R 188-189). At about the same time, the wife was proceeding with an order to show cause of her own: why the defendant should not be held in contempt and

amounts unpaid under the original decree reduced to judgment (R 194-197).

The matters were heard by Honorable Stewart M. Hanson, Jr., on May 3, 1977, at which time both the husband and wife testified (transcript of May 3, 1977).

Dale Kessimakis's evidence showed that he is 39 years old (Tr 8), that he and Betty built a home in the spring of 1972 on land donated by Dale's father, which was worth approximately $10,000 to $12,000. In addition Dale's father put up $9,000 in cash and Betty contributed $15,000 of her own (Tr 9). The couple borrowed additional funds from Walker Bank to finance the home; Dale and his friends worked on the house without charge; and a number of items were provided by his friends at low cost (Tr 10).

At the time, Dale was making $110 per week net, and to increase his earnings he worked for a friend setting tile and raised quail for marketing (Tr 11). In the 1972-1973 period, he earned approximately $1,000 to $2,000 per month selling quail one of the years, and approximately $1,000 per month the other year. In raising the quail he paid only for the feed, his father furnishing the lights and gas.

The home was valued in May 1974 at $65,000, and was furnished (Tr 12). Walker Bank Company held two mortgages on the home, one for $15,000 and one for $6,000. The other assets were his quail, a 1969 Oldsmobile worth $1,000 to

$1,200, furniture worth approximately $3,000 to $5,000, and a piano. He did not own any stock in Kessimakis Produce (Tr 13).

Just prior to the divorce, Dale had approximately 200 quail, one large brooder and a half dozen smaller ones, and one large incubator and one small one. The quail were "qirtonia" quail, which reached maturity in six to eight weeks. At the time of divorce Betty wanted $200 alimony, $100 support money for each of the three children, and the mortgage payment of approximately $318 (Tr 14) a total of more than $800 per month. In addition, Dale was ordered t pay all obligations.

He testified that he gave Betty his entire amount of his paychecks in 1974 (Tr 15) and gave her money up until January 1975 in cash (Tr 16). Whenever he had extra money or received any from his father, he gave it to Betty. In 1974 his father gave him $1,000 to $2,000. In these transactions he would simply ask his father if he could borrow some money and his father would give it to him. He did no give receipts to his father or get them from Betty. In January 1975, he had about 2000 quail left (Tr 17), one brooder worth about $50, and one incubator worth about $ By that time he had sold just about everything he could a did not have any breeding stock left. During 1974 he als sold all of his falconry equipment, most of his quail and

some cages, paintings, prints, his boa constrictors and pythons, leaving him virtually nothing in the way of tangible assets.

In 1975 he had no gainful employment other than with his father's company. His father gave him money (Tr 18) in the amount of about $2,000 per year over and above what he earned at the company. He kept records of payments to Betty and the children in a small book (Exhibit 2-D, Tr 19), and most of the money given to the children came from his father. The record he kept included produce and food brought from the market, plus his salary (Tr 21).

Since 1975, Dale has not had any employment other than working for his father (Tr 24). He is now earning $190 per week, net, or $823 per month. He had earned $125 per week when the divorce began. The parties daughter, Cindy, had been living with Dale for about six months prior to the hearing (Tr 25).

From the date of the decree, Dale paid Betty in cash, giving her the amount of his paycheck, plus extra money received from his father, plus the income from items sold. He continued to do this until the end of January 1975, a six month period (Tr 28). During 1974 he received $1,000 to $2,000, and perhaps more, in gifts from his father. This money he gave to the children and to Betty (Tr 31). In 1974, besides the income from his produce job, he sold some

quail and worked on a job with a friend. At the time of the hearing he was working for his father in the produce business. He can't raise quail at this time because he does not have breeders and does not have the funds to obtain any. He has one falcon left but does not raise any other birds (Tr 32).

Dale does not own any interest in the produce corporation and has not acted as an officer or director (Tr 34). His father, who is 89 years old and runs the business, has indicated that when he dies he may leave the business to Dale and his brother (Tr 36). Dale had not paid any part of the $500 awarded as attorneys fees, and had not paid the Master charge, but gave Betty money with which she could have paid it. He did pay the one doctor bill (Tr 37, 38).

For the years 1974 and 1975, his income tax returns were prepared by a certified public accountant and were filed with the Internal Revenue Service (Tr 39). About a year ago he had received from the company over and above his salary, the amount of $1,500 to $1,700, but he did not understand the difference between a "dividend" and a "bonus" (Tr 40). This was the only extra money he had received from the business. Other amounts he received from his father came from his father's pocket. He does not own a car or any stock and does not presently have any substantial expenses because he lives at his father's place (Tr 41-42).

The income tax returns prepared and filed by the certified public accountant, William J. Jackson, Jr. (R 176-177) show that Dale's adjusted gross income for 1974 was $7,995.01, and for 1975 was $9,365.55.

Betty Kessimakis testified that Dale had not given her any money from the time of the decree until the end of January 1975, that she lived on money she had in the bank then sold furniture then went on welfare.

In 1976, Betty sold the home awarded to her by the decree and received net proceeds of $38,000 (Tr 48). She used $19,000 of this for a down payment on a new home, paid $1,300 on attorneys fees, used some for living expenses, is buying furniture, and has no cash left (Tr 49).

She stated that as of November 1976, Dale began paying her $350 per month, and this was received for the months October 1976 through April 1977, but nothing else had been paid since the date of the decree. She testified that the total amount owing to her by Dale is $15,391.40 (Tr 46).

ARGUMENT

I

The trial court's refusal to modify the divorce decree was erroneous and inequitable.

The Utah statute, and cases from almost everywhere, consider divorce proceedings to be equitable in nature; but

occasionally a case slips through the cracks of the equitable basket and a husband is pointed toward lifelong fiefdom. Unless this court intercedes, this is such a case.

The governing Utah statute, 30-3-5 Utah Code Annotated 1953, provides:

> When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary* * *.

In this case there was nothing equitable about the original decree. With a stroke of the pen--by signing an entry of appearance and waiver--the husband in effect gave his wife virtually everything he had. In a default proceeding she was awarded the home, the equity in which was worth nearly $40,000, and he was ordered to make the mortgage payments of more then $300 a month on that home; she was given one-half of what business interest he had; she was given the parties' only automobile; she was given other personal property; and she was awarded $200 per month alimony and $300 per month for the support and maintenance of the three children. The husband was awarded his personal clothing and effects, such personal property as he might have in his possession, and all of the parties' obligations.

But there was nothing he could do about that. He had signed his life away and had awakened too late. The Family

Court Act provides for the appointment of counsel for children who are not represented, but makes no like provision for unwary husbands.

Appellant recognizes that it is now too late to challenge the original decree; but in a proceeding for modification of that decree, the court cannot be unmindful of obvious inequities in the original decree. Movever, it is at least arguable that substantial changes in circumstance need not be shown in order to obtain modification of a divorce decree. Prior to its amendment in 1969, 30-3-5 U.C.A. 1953 read as follows:

> When a decree of divorce is made the court may make such orders in relation to the children, property, and parties, and the maintenance of the parties and children as may be equitable; provided, that if any of the children have obtained the age 10 years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.

Since the 1969 amendment, the section has read, in part, as follows:

> When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintanance of the parties and children as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary * * * .

The earlier statute said nothing about jurisdiction to modify orders for the support of the children or the parties but the court recognized that substantial changes in circumstances might warrant such modification. And in a recent case, the court seemed to recognize a broader power under the present statute than that found to exist under the prior statute. In Iverson v. Iverson, 526 P.2d 1126 (Utah 1974), the court said:

> We appreciate that all aspects of proceedings in divorce matters are equitable; and that the court has "continuing jurisdiction to make such subsequent changes or new orders with respect to the. . .distribution of the property as shall be reasonable and necessary"; and that this includes the power to take the property from one spouse and to award it to another where the interests of justice so require. In making his determination the trial court may consider not only all the present circumstances of the parties, but what they may or may not have done in the rearing and support of the children.

The present statute, and the view of the court in Iverson, suggest that when proper circumstances are shown, a court has continuing jurisdiction to modify a divorce decree with respect to property, support, maintenance or custody, if the present circumstances establish the necessity of such a change, without a showing of any substantial change in circumstances. Certainly the legislature meant to do something by providing for "continuing jurisdiction", particularly in light of the interpretations of the former statute.

Be that as it may, the husband in this case is not

required to rely upon that statutory construction, because there was a substantial change in circumstances, or at least a change in what the court must have regarded the circumstances to be at the time the divorce decree was entered.

In its earlier opinion in this case (R 140), the court recognized that modification might be based not only on what the facts were at the time of the original decree, but what the court took them to be, saying:

> The principal complaint made by the defendant is that the court imposed upon him a financial burden with which he was unable to comply, and that the plaintiff did not testify truthfully to his wealth and earnings at the time of hearing. If such be a fact, he is not helpless. He may petition the trial court for a modification of the terms of the decree, if there is a change in circumstances. While his actual earnings now may be the same as there were at the time of the divorce, neither party can at this late day dispute the findings made by the court at the hearing. If plaintiff's earnings and wealth are now less than what the court found them to be, there is a change of circumstances which would justify a consideration by the court for the need to modify the original decree.

Although the court had made no findings with respect to the value of the properties distributed to the parties, or the earnings of the husband, it is apparent that those matters were presented and presumably considered by the court at the time the original decree was entered; and in those instances in which a decree is based upon expressed or assumed facts, a showing that those facts are not presently true may justify modification of the decree.

Felt v. Felt, 27 Utah 2d 103, 493 P.2d 620 (1972), arose

in a different way, but recognized the importance of assum
or contemplated facts. The court said:

> * * * we affirm our previous pronouncements that a divorce decree containing awards for support based on either expressed or assumed facts contemplated by the parties or the court or both, should not be modified when the comtemplated facts are obvious or agreed to b the parties and in turn incorporated in the decree, in which the continuous jurisdiction of the court to modify should not be used to thwart the expressed or obvious intentions of the parties and/or the court,-- unless such contemplated facts lead to manifest injus- tice or unconscionable inequity.

In this case we are concerned with assumed facts and expressed facts which turned out not to be true. The facts assumed by the court are shown in the transcript of August 2, 1974. The primary ones were that the husband was able t make from $600 to $3,000 a month, that during the last few months he had been making "anywhere from four to 800 a week," and that the equity in the home was worth approxi- mately $30,000.

At the hearing for modification of the decree, it was shown that the defendent's income at that time was $190 pe week or $823 per month, that his prior income had been sup lemented by sales of capital assets, that he no longer had assets to sell, that he was dependent upon income from his job in the produce company and gifts and support provided his father. It also showed that the equity in the home was substantially greater than the court was told.

Grounds for modification having been shown, the trial

court should have looked at the total situation of the parties and should not have permitted continuation of a situation in which the husband was saddled with obligations which he will never be able to meet.

In the past this court has not hesitated to overturn rulings of the trial court which have placed an impossible burden on a husband.

In Hamilton v. Hamilton, 27 Utah 2d 206, 494 P.2d 287 (1972), this court substituted its judgment for that of the trial court because a review of the record "led to a conclusion that that decree places a burden upon the defendant that he will probably be unable to meet."

In Martinett v. Martinett, 8 Utah 2d 202, 331 P.2d 821 (1958), the court modified a judgment of the trial court which awarded two homes to the wife, and said:

> It seems to us that [the husband] is not entirely without justification in regarding the property award as so disproportionate to his desserts that it is a poor reward for his long years of effort in contributing to its accumulation. He admits, however, that the income that he had should be sufficient for his needs if properly managed.
>
> With due deference to the conscientious efforts of the trial court to make a fair and equitable adjustment between these parties, which he accomplished in the main, we are nevertheless of the opinion that inasmuch as the parties own two homes, the defendant should have been awarded at least the one of the lesser value.* * *

In Wilson v. Wilson, 5 Utah 2d 79, 296 P.2 977 (1956), it was pointed out that

> The court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their live on a happy and useful basis.

Other courts have taken a similar view. In Bell v. Be 150 Colo. 174, 371 P.2d 773 (1962), the court recognized that where the property division made by the trial court is inequitable or unconscionable, or where there is an abuse o discretion, the reviewing court will modify the action of the trial court. In Lopez v. Lopez, 148 Colo. 404, 366 P.2 373 (1961), the Colorado Supreme Court noted that the divorce decree "should not result in an appropriation of th entire estate of the husband, or in the impoverishment of t husband to the extent that he is unable to maintain himself as a working unit."

Other cases recognizing that a divorce court should no make an award that will impoverish the husband, or would leave him without money of his own, or lead to insolvency are Santilli v. Santilli, 169 Colo. 49, 453 P.2d 606 (1969) and Rhodes v. Rhodes, 370 P.2d 902 (Alaska, 1962).

The difficulties encountered by husbands who are saddled with a decree too weighty for them to bear is well summarized in a concurring opinion by Justice Crockett in Wallis v. Wallis, 9 Utah 2d 237, 342 P.2d 103, 106 (1959):

> * * * In many cases the circumstances [surrounding th granting of the divorce] require that the husband be

> loaded with as heavy a burden as he can bear. Sometimes, through no fault of his own, circumstances become worse; the expense of going into court prevents him from seeking adjustment of the decree; and when he is cited for contempt, an insuperable debt has accumulated. Different from other obligations, it cannot be discharged in bankruptcy. So he finds himself floundering in deep waters with such a weight around his neck that he will never be able to extricate himself. * * *
>
> * * * the purpose of the divorce decree and of the conduct of the parties under it must be calculated toward the solution of existing problems and the sustenance of the parties so they can reconstruct their lives on the most wholesome foundation possible under the circumstances. The purpose of the provisions for alimony and support money is to provide for the current needs, and not to allow the beneficiary to sit by and permit a burdensome debt to accumulate and then use it to harass the defendant so that he cannot hold a job or live a respectable existence. * * *

In this case the trial court should have done something to relieve Dale Kessimakis of an unconscionable burden. Regardless of what the facts were at the time of the original divorce decree, at the time of the modification hearing they were substantially different from what the court had assumed them to be, based upon Betty's testimony.

Dale's present position is that he has a judgment against him for $16,391.40, and is obligated to pay to the plaintiff for her support and the support of the two minor children still in her custody, the sum of $400 per month. Interest on the judgment amounts to approximately $106 per month, which brings the payments to in excess of $500 per month, just to stay even. If Dale were to pay additional sums to reduce the principal of the judgment, he would have

no funds left for himself, and would be dependent upon the charity of his father.

The divorce court, sitting as a court of equity, has the power and flexibility to fashion a remedy. It may be true that it is too late to do anything about the property division, but it is not too late to do something about the alimony and support money in such a manner as to permit Dale to pay the past indebtedness. A reasonable and equitable remedy in this case would be to modify the decree to amortize the judgment so that is would be paid off in 3 1/2 years, and suspend payment of alimony and support during th period, whereupon the court again could consider the needs and financial abilities of the parties. Such a decree woul permit Dale to extricate himself from the burdensome debts that have been placed upon him and, at the same time, would give to plaintiff funds necessary for support and maintenan of herself and the two children.

II

The court erred in adjudging appellant guilty of conte

The trial court not only refused to do anything to relieve this husband of the unconscionable burden that had been placed upon him, but found him in contempt of court a sentenced him to 30 days in jail.

The evidence established that the husband had made th mortgage payments in the amount of $350 between February 1

and August 1976, and that subsequently from August 1976 until the date of trial, he had paid the sum of $350 per month to the wife.

The court found that there had been no material change in Dale's income or earnings since the entry of the decree, "except to the extent that they have been self imposed." There was no finding of ability to pay or of willfulness in disabling himself from paying. Yet the court concluded that the defendant's acts, conduct and omissions had been contemptuous. The findings do not support the conclusion.

While some cases have talked about inability to preform being no excuse if he is unable to perform "as a result of his own action;" e.g., Brown v. Cook, 123 Utah 505, 260 P.2d 544 (1953), the cases generally seem to require something more then the mere fact that the party put it out of his ability to perform. There must be some element of willfulness or deliberateness in order to support a judgment for contempt. Ex parte Gerber, 83 Utah 441, 29 P.2d 932, 933 (1934); and Parish v. McConkie, 84 Utah 396, 35 P.2d 1001 (1934).

In this case the defendant's inability might well have been caused by something he did himself, e.g., selling of breeding stock of quails and other capital assets in order to satisfy indebtedness, but such inability would still not

result from the willfulness or deliberateness necessary to support a judgment of contempt. The court here did not fir such willfulness, but only that he may have put it out of his ability to earn as much as he had earned previously.

CONCLUSION

The trial court seemed to forget that it was sitting a a court of equity and was bent upon punishing Dale Kessima for his inability to respond completely to the unconscionab burden that had been placed upon him in the original decre notwithstanding preponderating credible evidence that there had been a substantial change in circumstances from what th court assumed the circumstances to be at the time of entry of the original decree. This being the case, the court should have exercised its equitable powers to grant some relief to this appellant. He cannot meet the payment sched imposed upon him by the court unless he obtains help from friends and relatives. This being an equity case, this court may review questions of both law and fact. Article Section 9, Utah Constitution. The findings of the trial court are against the weight of the evidence insofar as they find that there has been no substantial change of circumstances. The equity in the home was substantially mo then Betty Kessimakis said it was, and Dale Kessimakis' earnings were substantially less. These facts, taken together with the amount of his present earnings, compared

with the burdens of the decree, required the trial court to grant relief. Since it did not do so, this court should.

Respectfully Submitted,

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CERTIFICATE

This is to certify that two copies of the within brief were served this _____ day of December, 1977, by mailing them in a sealed envelope, postage prepaid, addressed to Brant H. Wall, Esq., 500 Judge Building, Salt Lake City, Utah 84111, attorney for plaintiff and respondent.